



University of Arkansas at Little Rock Law Review

Volume 39 | Issue 2

Article 3

2017

Gender-Selective Service: The History and Future of Women and the Draft

Elizabeth Farrington

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>

 Part of the [Civil Rights and Discrimination Commons](#), [Law and Gender Commons](#), and the [Military, War, and Peace Commons](#)

Recommended Citation

Elizabeth Farrington, *Gender-Selective Service: The History and Future of Women and the Draft*, 39 U. ARK. LITTLE ROCK L. REV. 279 (2017).

Available at: <https://lawrepository.ualr.edu/lawreview/vol39/iss2/3>

This Essay is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

GENDER-SELECTIVE SERVICE: THE HISTORY AND FUTURE OF WOMEN AND THE DRAFT

*Elizabeth Farrington**

I. INTRODUCTION

On December 1, 2016, President Obama became the first President since Jimmy Carter¹ (and the second sitting President ever) to publicly support requiring women to register for the draft: “As old barriers for military service are being removed, the administration supports—as a logical next step—women registering for the Selective Service.”² Of course, that support was largely symbolic; at the time his administration announced its support, President Obama had fifty days left in office, and the 2016 Senate provision³ requiring women to register for selective service had already died in the House.⁴

To be sure, the debate feels merely symbolic altogether. The United States has not drafted a man into service since 1972, and the military has been entirely voluntary since the Vietnam War.⁵ Comprising only those enlisted by their own volition, the U.S. Military remains the strongest in the world.⁶ Even so, the U.S. Government has, at least for the time being, decided to keep selective service in its back pocket, should a situation arise.

But the debate itself is important to anchor the discussion surrounding the role of women in the U.S. Armed Services, particularly following the 2016 election. While Secretary of Defense Panetta officially lifted the ban

* Judicial Law Clerk to the Honorable Helene White, U.S. Court of Appeals for the Sixth Circuit. J.D. 2016, University of Illinois College of Law; M.A. 2013, Old Dominion University; B.S. 2007, U.S. Naval Academy. This Essay was shaped, in large part, through my time on active duty from 2007–2013. But the views expressed herein are mine alone and in no way purport to represent the views of the U.S. Navy.

1. Transcript: Selective Service Revitalization Statement on the Registration of Americans for the Draft (Feb. 8, 1980), available at <http://www.presidency.ucsb.edu/ws/?pid=32906>.

2. Gregory Korte & Tom Vanden Brook, *White House: Obama Supports Registering Women for Military Draft*, USA TODAY (Dec. 1, 2016, 5:03 PM), <http://www.usatoday.com/story/news/politics/2016/12/01/obama-supports-registering-women-military-draft/90449708/>

3. See *infra* note 9.

4. See *infra* Part IV.

5. Mark Thompson, *America's Last Draftee: "I'm a Relic,"* TIME, (Feb. 7, 2009), <http://content.time.com/time/nation/article/0,8599,1877943,00.html>.

6. CREDIT SUISSE, *The End of Globalization or a more Multipolar World?*, 41 (Sep. 2015), available at <http://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=E7A6A5D-D9D5-6204-E9E6BB426B47D054>.

on women in combat in 2013,⁷ the GOP's 2016 official platform sought "to exempt women from 'direct ground combat units and infantry battalions.'"⁸ Republicans in Congress kept step with the spirit of that policy. The Senate passed the National Defense Authorization Act (NDAA), which included a provision for an all-gender draft, but the provision was removed by the time the bill made it to the floor of the Republican-controlled House.⁹ The question of registering women for the draft would be left to the next Congress to ignore or decide, one under Republican control that may plan to reinstate the ban on women in combat roles.¹⁰ These two issues—women in combat roles and women registering for the draft—are separate, but intrinsically linked. If women remain eligible for combat positions, which they are as of the date of this publication, Congress may be hard-pressed to find justification for excluding women from draft registration.¹¹ This essay argues that requiring women to register for the draft is not only the logical next step towards gender parity in the military; it is also absolutely required to remain faithful to the Supreme Court's gender discrimination precedent.

At many crucial points in our nation's history, "in fundamental issues of social fairness, the military has led the country in doing what is right."¹² But not so with the role of women in the military. Exploring the progress of women in uniform alongside that of their civilian counterparts, this essay notes that the strides women in the military made—while incredible, and rightfully lauded—were met with greater resistance. As the Supreme Court was recognizing the need for increased scrutiny in gender discrimination cases, women in uniform were being denied access to most rates and billets in their respective service.¹³ Just as women finally seemed to be making headway in gaining leadership positions, the United States sought to in-

7. Elisabeth Bumiller and Thom Shanker, *Pentagon Is Set to Lift Combat Ban for Women*, N.Y. TIMES (Jan. 23, 2013), <http://www.nytimes.com/2013/01/24/us/pentagon-says-it-is-lifting-ban-on-women-in-combat.html>.

8. Jeff Daniels, *Trump Could Nix Obama's Women in Combat Military Policy*, CNBC (Nov. 14, 2016, 5:08 PM), <http://www.cnbc.com/2016/11/14/trump-could-nix-obamas-women-in-combat-military-policy.html>.

9. Compare S.2943, 114th Cong. § 591 (2016) ("National Defense Authorization Act") (Sec. 591(b)(1): "The duty to register imposed on male citizens and persons residing in the United States by subsection (a) shall apply to female citizens of the United States and female persons residing in the United States who attain the age of 18 years on or after January 1, 2018."), with H.R. 4909, 114th Cong. (2016) (enacted) ("National Defense Authorization Act") (provision removed). See Richard Sisk, *Congress May Not Require Women to Register for the Draft*, MILITARY.COM (Nov. 8, 2016), <http://www.military.com/daily-news/2016/11/08/congress-require-women-register-draft.html>.

10. Sisk, *supra* note 9.

11. See *infra* Part II.B.

12. Lt. Gen. Julius Becton, Jr., USA(ret.), Presentation: *The Military and Public Behavior* (Dec. 1997), <http://www.upenn.edu/pnc/ptbecton.html>.

13. See *infra* Part II.B.

crease the size of the military and prepare for any number of real world scenarios that could escalate to World War III,¹⁴ but the executive and legislative branches disagreed on the best way to do so. President Carter reinstated the draft with a provision to include women, but Congress elected to authorize the funds required to register only men.¹⁵

The decision to keep women from registering for the draft was immediately challenged and quickly made its way to the United States Supreme Court. In *Rostker v. Goldberg*,¹⁶ the Court upheld the provision, showing unwavering deference to Congressional findings despite the established intermediate scrutiny standard.¹⁷ In the years that followed, women in the military had to overcome that stigma. With a little help from the Virginia Military Institute, decades of slow, silent soldiering on culminated in 2013 when Defense Secretary Carter ended the combat exclusionary rule for women and opened all military roles to women who qualify.¹⁸ The Supreme Court may hear challenges in the coming terms regarding gender neutral draft registration, with the architect of intermediate scrutiny now on the other side of the bench.

II. THE DIVERGING LIVES OF WOMEN IN AND OUT OF UNIFORM

The 1960's and 70's—the “second-wave” of feminism—saw the women's movement, that had previously focused on suffrage and property rights, broaden to include sexuality, workplace equality, and reproductive rights.¹⁹ Legal victories helped solidify the foundation for the movement, particularly the Equal Pay Act,²⁰ Title VII of the Civil Rights Act of 1964,²¹ Title IX,²² and *Griswold v. Connecticut*, which struck down the state's ban on contraception under the now widely applied right to privacy found in the “penumbras” and “emanations” of other constitutional protections.²³

14. See *infra* Parts II.B., II.C.

15. See *infra* Part II.C.

16. 453 U.S. 57 (1981).

17. *Id.* at 83.

18. See Sisk, *supra* note 9.

19. See generally Cynthia Harrison, *Creating a National Feminist Agenda: Coalition Building in the 1970s*, in *Feminist Coalitions*, in *FEMINIST COALITIONS: HISTORICAL PERSPECTIVES ON SECOND-WAVE FEMINISM IN THE UNITED STATES*, 19 (Stephanie Gilmore ed., 2008).

20. The Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d)(1) (2016)).

21. 42 U.S.C. § 2000e-2 (1991).

22. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235 (June 23, 1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (1986)).

23. 381 U.S. 479 (1965).

As the movement gained momentum on the civilian front, women seeking to broaden their roles in the military found legal support as well. President Johnson signed Public Law 90-130 in 1967, which opened advanced military ranks to women (including General and Admiral) and lifted the two percent ceiling on the number of women in the military.²⁴ Then in 1975, President Ford signed Public Law 94-106,²⁵ authorizing women to be admitted into the service academies.

Even so, the push for gender parity in the armed services was met with greater opposition from both military and civilian leadership. While endorsing the law that opened advanced military ranks to women, the House Armed Services Committee nevertheless stated: "There cannot be complete equality between men and women in the matter of military careers. The stern demands of combat, sea duty, and other types of assignments directly related to combat are not placed upon women in our society."²⁶ The Committee further noted that "[t]he Defense Department assured [them] that there would be no attempt to remove restrictions on the kind of military duties women will be expected to perform."²⁷ General Hershey, former Director of the Selective Service System, echoed: "There is no question but that women could do a lot of things in the military service. So could men in wheelchairs. But you couldn't expect the services to want a whole company of people in wheelchairs."²⁸

It's easy to view the long, slow road to military gender parity in a vacuum; fifty years after the Department of Defense "assured the committee" that women would remain barred from the majority of billets, the DoD rescinded the combat exclusion and eliminated all gender-based barriers to service.²⁹ In three generations, women went from total exclusion to formal parity. But women out of uniform faced an uphill battle as well and saw faster, broader progress. While many of the causes second-wave feminism fought for impacted women in uniform, there was no blueprint available for challenging gender discrimination in the military before the American Civil Liberties Union (ACLU) invested in women's rights and placed Ruth Bader Ginsburg at the helm.

24. Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 374 (1967).

25. Act of Oct. 7, 1975, Pub. L. No. 94-106, 89 Stat. 531 (1975).

26. Report of the Armed Services Committee of the U.S. House of Representatives, in VICTORIA SHERROW, *WOMEN IN THE MILITARY* 24 (2007).

27. *Id.*

28. Note, *The Equal Rights Amendment and the Military*, 82 YALE L. J. 1533, 1533 n.5 (1973) (quoting Coye, *The Restricted Unrestricted Line Officer: The Status of the Navy's Woman Line Officer*, NAVAL WAR COLLEGE REV. (1972).

29. See Bumiller and Shanker, *supra* note 7.

A. Ruth Bader Ginsburg & Intermediate Scrutiny

While many second-wave feminist scholars view Betty Friedan or Gloria Steinem as the “mother of the movement,”³⁰ Ruth Bader Ginsburg’s effort as Director of the ACLU’s Women’s Rights Project deserves praise in its own right. Before Ginsburg argued for a higher standard of review for statutes that distinguish between citizens on the basis of gender, the U.S. Supreme Court had never found a gender classification unconstitutional.³¹ “Ginsburg recognized the need for a well-developed, long-range strategy to chip away at precedent, to establish new principles incrementally, and to pave the way for changing the law on gender discrimination.”³²

Prior to Ginsburg’s time with the ACLU, the Supreme Court applied two standards of review to analyze an Equal Protection challenge to a statute: “rational basis,” with maximum deference, or a “more stringent” test that would later be known as “strict scrutiny.”³³ The more stringent test derived from Justice Harlan Stone’s majority opinion in *United States v. Carolene Prods. Co.*³⁴ Nearly hidden in what would otherwise remain an “utterly unremarkable” decision,³⁵ Justice Stone noted that the deference afforded to economic regulations—the “rational basis” test—was “inadequate when dealing with fundamental rights, particularly in the case of ‘discrete and insular minorities.’”³⁶

Out of that footnote grew the “strict scrutiny” standard. In legislation that does not implicate a fundamental right or a suspect class of “discrete and insular minorities,”³⁷ courts will uphold the law so long as there is a rational basis for it.³⁸ However, if the legislation implicates a fundamental right or a “suspect class” of persons,³⁹ courts will strike down the law unless it is “narrowly tailored” to serve a “compelling government interest.”⁴⁰ The strict scrutiny test has primarily been applied to statutes that distinguish between persons on account of their race,⁴¹ but has also been used to strike

30. See Harrison, *supra* note 19 at 23.

31. Toni J. Ellington et al., *Justice Ruth Bader Ginsburg and Gender Discrimination*, 20 U. HAW. L. REV. 699, 715 (citations omitted).

32. *Id.* at 720.

33. *Id.* at 714.

34. 304 U.S. 144, 152 n.4 (1938).

35. See Elizabeth Farrington, Note, *Federally Mandated Discrimination: The Irreconcilability of Civil Rights and Export Control*, 2016 U. ILL. L. REV. 251, 277–78.

36. *Id.* at 278 (quoting *United States v. Carolene*, 304 U.S. 144, 152 n.4 (1938)).

37. *Id.*

38. See *Carolene Prods.*, 304 U.S. at 152.

39. *Id.* at n.4.

40. See, e.g., *Loving v. Virginia*, 388 U.S. 1 (1967).

41. See *id.*; See also *Palmore v. Sidoti*, 466 U.S. 429 (1984).

down classifications based on religion,⁴² national origin,⁴³ alienage (if the classification is found in a state statute),⁴⁴ and fundamental rights.⁴⁵

For all the progress the movement made pressuring elected officials to pass gender parity legislation,⁴⁶ the laws were not rigorously enforced.⁴⁷ Ginsburg thus “sought to challenge gender classification principles by educating the Court and the legal community of the changing roles of women. Ginsburg’s initial step was ‘to awaken the Supreme Court and begin to persuade the court to take seriously the argument that sex-based classifications [were] inherently suspect.’”⁴⁸ The problem with applying the strict scrutiny standard to laws that distinguish on the basis of gender is, first and foremost, that women make up half of the population.⁴⁹ While scholars may disagree on what “discrete and insular minorities” means, most agree that women, as a class, are not one.⁵⁰ Even so, Ginsburg “skillfully crafted the pattern for structuring her argument: focus on the strict scrutiny standard; identify the government objective; challenge the assumption and/or overbroad generalization about women; compare the status of ‘similarly situated’ males and females; and demonstrate the irrationality of the relationship between classification and government interest.”⁵¹

42. See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

43. See *Hernandez v. Texas*, 347 U.S. 475 (1954).

44. See *Graham v. Richardson*, 403 U.S. 365 (1971).

45. This term is usually understood to represent the rights explicitly or implicitly guaranteed by the Constitution. See, e.g., *Watchtower Bible and Tract Soc’y of N.Y. v. Village of Stratton*, 536 U.S. 150 (2002) (striking down an ordinance requiring registration before religious solicitors go door to door as violating the First Amendment). Of note, the First Amendment has varying degrees of scrutiny depending on the type of speech that is involved; for example, commercial speech receives intermediate scrutiny. See *Cent. Hudson v. Pub. Serv. Comm’n*, 447 U.S. 557 (1980). But as a general rule, courts will apply strict scrutiny to laws that impact an individual’s ability to exercise the “fundamental rights” – including but limited to voting, reproductive freedom, and interstate travel. See *Ellington et al.*, *supra* note 30, at 716 (citing *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973)); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966); *Roe v. Wade*, 410 U.S. 113 (1973); *Mem’l Hosp. v. Maricopa Cty.*, 415 U.S. 250, 254 (1974); *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969) *overruled in part by* *Edelman v. Jordan*, 415 U.S. 651 (1974).

46. See *supra*, notes 18–22.

47. *Ellington et al.*, *supra* note 31, at 720.

48. *Id.* at 720–721 (citing Deborah L. Markowitz, *Ruth Ginsburg: Women’s Rights Advocate-Supreme Court Justice*, 20 VT. B.J. & L. DIG., Oct. 1994, at 9); Jennifer S. Thomas, *Ruth Ginsburg: Carving a Career Path Through Male-Dominated Legal World*, 51 CONG. Q. WKLY. REP. 29, July 17, 1993, at 1876.

49. *Age and Sex Composition: 2010*, U.S. CENSUS BUREAU (May 2011), <https://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf>.

50. See Natalie Wexler, *Sex Discrimination: The Search for a Standard*, SUP. CT. HIST. SOC., http://supremecourthistory.org/lc_womens_rights.html (last visited Feb. 28, 2017) (“But women do not fit neatly into the *Carolene Products* mold of “discrete and insular minorities”: they are not discrete or insular, nor are they a minority.”).

51. *Ellington et al.*, *supra* note 31, at 722.

In 1971, Ginsburg challenged an Idaho statute that created a preference for men as administrators of estates.⁵² Because the “law assumed that men had more business experience and were better qualified as administrators,”⁵³ she argued that “the civil status of women was no longer subject to general legal disabilities and sex, as an unalterable trait, should be considered a suspect classification under the Equal Protection Clause.”⁵⁴ Comparing sex discrimination to segregation, Ginsburg focused her argument on the stereotypes of women often cited to justify discriminatory laws.⁵⁵ The Supreme Court was adequately persuaded, but not in the way Ginsburg hoped: it struck down the law because it lacked a rational basis.⁵⁶ The Court did not adopt strict scrutiny to analyze laws distinguishing on the basis of gender.⁵⁷

Ginsburg had another chance to convince the Court that heightened scrutiny was required in gender discriminatory statutes just eighteen months later. In *Frontiero v. Richardson*,⁵⁸ Ginsburg challenged statutes providing dependency benefits to all wives of servicemen, but not to all husbands of servicewomen. Brilliantly, by challenging gender classifications that formally *avored* women, Ginsburg was able to highlight how longstanding stereotypes lack rational basis and detrimentally impact both men and women.⁵⁹ The Court overturned the statute, but a plurality of only four Justices, led by Brennan, voted to adopt strict scrutiny. The other members of the eight-Justice majority followed *Reed* to strike down the statute under rational basis.⁶⁰

Without a majority to support the application of strict scrutiny, Ginsburg began advocating for a middle ground—an intermediate standard of review. Focusing on Social Security cases, where widowers received fewer benefits than widows, and jury duty cases, where service was mandatory for men and voluntary for women, Ginsburg found “mixed results.”⁶¹ In one such social security case, a young woman died in childbirth and her widow-

52. *Reed v. Reed*, 404 U.S. 71 (1971).

53. Ellington et al., *supra* note 31, at 723.

54. *Gender and Legal History Paper Summary*, GEORGETOWN LAW LIBRARY, <https://www.law.georgetown.edu/library/collections/gender-legal-history/glh-summary.cfm?glhID=629544B9-D3C4-BA2A-1D1AB3EA82759959> (last visited May 26, 2017).

55. Ellington et al., *supra* note 31, at 722–23.

56. *Reed*, 404 U.S. at 77.

57. *Id.*

58. 411 U.S. 677 (1973) (plurality opinion).

59. Ginsburg also argued that this actually hurt women by relegating them to a dependent place in a man’s world. See Ellington et. al, *supra* note 31, at 729. But formally, this statute placed a higher burden on men than women, and was thus viewed as more favorable to female military spouses.

60. Ellington et al., *supra* note 31, at 730 (citing *Frontiero*, 411 U.S. at 678).

61. Deborah L. Markowitz, *In Pursuit of Equality: One Woman’s Work to Change the Law*, 14 WOMEN’S RTS. L. REP. 335, 345–46 (1992).

er became unemployed due to difficulty seeking childcare for his infant son.⁶² The father obtained social security benefits, but the other available “mother’s insurance benefits” were authorized for women only.⁶³ The Court unanimously struck down the statute, finding that the challenged classification was indistinguishable from the statute in *Frontiero*⁶⁴ and that “all parties were victims of invidious sex-discrimination.”⁶⁵ Again, however, the Court declined to formally adopt heightened scrutiny.

Less than one year later, that changed. The Supreme Court heard *Craig v. Boren*, which challenged an Oklahoma law that allowed women to buy certain beer after turning eighteen whereas men were not allowed to do so until they turned twenty-one.⁶⁶ The ACLU did not represent the plaintiffs, but Ginsburg wrote an amicus brief arguing that sex classifications should be subject to *heightened*, though not necessarily strict, scrutiny and writing that “sex classification could not be justified on any basis.”⁶⁷ The Court agreed. The majority found the law violated the Equal Protection Clause because it was not shown to be “substantially related to [the] achievement of the statutory objective.”⁶⁸ That has now become the “intermediate scrutiny” standard—a law that distinguishes between individuals on the basis of sex must be “substantially related” to an “important government objective.”⁶⁹

Due in large part to Ruth Bader Ginsburg, just five years after the Supreme Court first struck down a statute that classified individuals on the basis of sex, the intermediate scrutiny standard became precedent.

B. Wearing the Stripes, Earning the Salute

On one hand, comparing the legal and societal progress of women in and out of uniform during the 1970’s should be straightforward—like comparing apples to apples that sometimes wear an orange peel. As just one example, *Frontiero* challenged statutes providing dependency benefits to all wives of servicemen, but not to all husbands of servicewomen.⁷⁰ Invalidating that statute impacted many women, but it specifically impacted women

62. See *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 (1975).

63. *Id.*

64. *Id.* at 653.

65. Ellington et al., *supra* note 31, at 733. Ginsburg wrote that the majority of Justices “thought it was discrimination against the woman as wage earner A few thought it was discrimination against the man, because he didn’t have the same opportunity to give personal care to the baby And one, [Chief Justice Rehnquist], thought it was discrimination against the baby.”

66. 429 U.S. 190, 191–192 (1976).

67. Ellington et al., *supra* note 31, at 735 (citation omitted).

68. *Craig*, 429 U.S. at 204.

69. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996).

70. 411 U.S. 677, 690–691 (1973) (plurality opinion).

in uniform who are married to a non-military spouse. But the hierarchy in place within the U.S. Armed Forces provides a legal and administrative system all its own. As a result, many of the women seeking to challenge discriminatory practices or policies in the military had to do so through administrative channels, often without the benefit of counsel and without the opportunity to find public support.⁷¹ Even so, the comparison is useful in setting the stage for legislative and judicial response to the question of women and the draft.

Although President Johnson lifted the two percent ceiling on the number of women in the military in 1967,⁷² each respective branch of the military could “prescribe the authorized strength of female enlisted and officer personnel.”⁷³ This stymied any effect lifting the ban might have had. In 1973, the Secretaries of each branch chose to limit the number of female service members to less than two percent of the total service personnel.⁷⁴ By choosing to employ so few females compared to their male counterparts, the military was able to place more stringent demands on female applicants. Specifically, men could enlist at age seventeen, whereas women had to be older than eighteen.⁷⁵ Women with dependent children had to obtain a waiver to enlist, which was not required of male enlistees.⁷⁶ Women also needed to achieve higher scores on mental aptitude tests and had to possess higher educational certifications than their male counterparts.⁷⁷ Although barred from service specialties that require “heavy” labor, let alone combat, the minimum physical standard was more stringently applied to women than men as well.⁷⁸

What is striking about those standards, of course, is that the United States was actively drafting young men into military service at that time.⁷⁹ The U.S. Military thought it was better served by drafting men into service than accepting more women who were volunteering to join. There is no data available on which to argue the United States could have avoided a draft had

71. See generally JEANNE HOLM, *WOMEN IN THE MILITARY: AN UNFINISHED REVOLUTION* (1992).

72. Act of Nov. 8, 1967, Pub. L. No. 90-130, 81 Stat. 374 (1967).

73. *The Equal Rights Amendment and the Military*, *supra* note 28, at 1539 (citing 10 U.S.C. §§ 3209, 3215, 8208, 8215 (1970)).

74. See *Id.* (citing *Hearings Before the Special Subcomm. on the Utilization of Manpower in the Military of the House Comm. on Armed Services*, 92d Cong., 1st & 2d Sess. 12439 (1972)).

75. *Id.* at 1539 n.41 (citing 10 U.S.C. § 505 (1970)).

76. *Id.* at 1540 & n. 46 (citation omitted).

77. *Id.* at 1540 & n.42 (citation omitted).

78. *Id.* at 1540 n.44–45 (citations omitted).

79. *The Vietnam Lotteries*, SELECTIVE SERVICE SYSTEM, <https://www.sss.gov/About/Hist-ory-And-Records/lotter1> (last visited February 9, 2017).

they allowed more women to enlist, but eighty-five percent of military billets were noncombatant, even at the height of the Vietnam war.⁸⁰

Whether it was the result of the decision to end the draft and shift to an all-volunteer military force (AVF), the influence of the larger women's movement, or some combination of the two, women made tangible progress throughout the latter half of the 1970's towards military gender parity.⁸¹ Without the draft, the Department of Defense increased recruiting goals for women; by 1976, one in every thirteen recruits was female (compared to one in thirty just four years prior).⁸²

One of the most institutionalized barriers women faced was the opportunity to serve as an officer in the military. Female candidates for Army Officer Candidate School (OCS) needed two years of college and a mental aptitude score of 115; male candidates needed only a high school diploma or equivalent and an aptitude score of 110.⁸³ Direct appointments to a number of officer positions in the Navy and Marine Corps were statutorily limited to males⁸⁴ and the military's ROTC program only opened to women in 1970, and even then, was "available only on a limited, experimental basis."⁸⁵

For that reason, Public Law 94-106, which mandated female admission to the three major service academies (Army at West Point, Navy at Annapolis, and Air Force at Colorado Springs), was a monumental victory for women in the military.⁸⁶ The first women entered the service academies in

80. *The Equal Rights Amendment and the Military*, *supra* note 28, at 1541 (citing 118 CONG. REC. S4390 (daily ed. March 21, 1972)).

81. *See 1970's: The Decade, THE WOMEN'S MEMORIAL*, <http://www.womensmemorial.org/history/detail/?s=1970sthe-decade> (last visited February 4, 2017).

82. *Id.*

83. *The Equal Rights Amendment and the Military*, *supra* note 28, at 1542 & n.53 (citations omitted).

84. *Id.* at 1542 (citing 10 U.S.C. §§ 5575, 5576, 5577, 5587 (1970)).

85. *Id.* at 1542 & nn.57-58 (citations omitted).

86. *See* Act of Oct. 7, 1975, Pub. L. No. 94-106, 89 Stat. 531 (1975). The law provided:

Sec. 803. (a) Notwithstanding any other provision of law, in the administration of chapter 403 of title 10, United States Code . . . (relating to the United States Military Academy), chapter 603 of such title (relating to the United States Naval Academy), and chapter 903 of such title (relating to the United States Air Force Academy), the Secretary of the military department concerned shall take such action as may be necessary and appropriate to insure that

(1) female individuals shall be eligible for appointment and admission to the service academy concerned, beginning with appointments to such academy for the class beginning in calendar year 1976, and
(2) the academic and other relevant standards required for appointment, admission, training, graduation, and commissioning of female individuals shall be the same as those required for male individuals, except for those minimum essential adjustments in such standards required because of physiological difference between male and female individuals.

1976 and, unsurprisingly, were swiftly met with strong opposition.⁸⁷ But crucially, despite opposition both on and off campus, women were admitted to service academies and would be eligible to receive a commission through the academy starting in 1980.⁸⁸

With the service academies set to produce more female officers, the military found itself considering the billets these women would be eligible to fill. The Equal Rights Amendment (ERA) had passed and was pending ratification.⁸⁹ No one knew whether the ERA would be ratified or what effect it might have on the role of women in the military. It was never ratified,⁹⁰ but some of the steps taken by the military indicate that leadership expected some formal mandate regarding the billets women could fill and opted to proactively “open-up” a number of roles to women.⁹¹

Weapons training became mandatory for women⁹² and both the Army and Navy allowed women to enter pilot training.⁹³ For the first time, a woman was promoted to the rank of Brigadier General.⁹⁴ The U.S. Coast Guard reviewed the need for permanent female officers and found that, while there was “[n]o need for regular women officers . . . Nevertheless, considering all factors, it is in the overall best interest of the Coast Guard to begin a controlled women officer program with provisions for integration into the regular Coast Guard included.”⁹⁵ The report concluded: “Planning and execution

Id.

87. See generally SHARON HANLEY DISHER, *FIRST CLASS: WOMEN JOIN THE RANKS AT THE NAVAL ACADEMY* (2013).

88. See *Id.* (describing the conditions for the first class of female midshipmen at the Naval Academy); see also James Webb, *Jim Webb: Women Can't Fight*, WASHINGTONIAN (Nov. 1, 1979), <https://www.washingtonian.com/1979/11/01/jim-webb-women-cant-fight/> (“There is a place for women in our military, but not in combat. And their presence at institutions dedicated to the preparation of men for combat command is poisoning that preparation. By attempting to sexually sterilize the Naval Academy environment in the name of equality, this country has sterilized the whole process of combat leadership training, and our military forces are doomed to suffer the consequences.”).

89. Allison L. Held, Sheryl L. Herndon, & Danielle M. Stager, *The Equal Rights Amendment: Why the Era Remains Legally Viable and Properly Before the States*, 3 WM. & MARY J. WOMEN & L. 113, 116 (1997).

90. See Thomas H. Neale, *The Proposed Equal Rights Amendment: Contemporary Ratification Issues*, CON. RES. SERV., 8–11 (Apr. 8, 2014), <http://www.equalrightsamendment.org/misc/CRS%20ERA%20report%204-8-14.pdf>.

91. See generally HOLM, *supra* note 71.

92. See 1970's: *The Decade*, THE WOMEN'S MEMORIAL, <http://www.womensmemorial.org/history/detail/?s=1970sthe-decade> (last visited February 4, 2017).

93. *Id.*

94. Sarah Begley, *This Woman was the First Female General in the U.S. Armed Forces*, TIME (June 11, 2015), <http://time.com/3916073/anna-mae-hays-female-general/>.

95. *Women & the U.S. Coast Guard: Moments in History*, U.S. COAST GUARD, <https://www.uscg.mil/history/uscghist/womenchronology.asp> (last visited February 1, 2017).

of a women officer program in the Coast Guard is overdue.”⁹⁶ Each branch welcomed female officers and enlisted personnel into its respective intelligence community,⁹⁷ along with other restricted line specialties like the Judge Advocate General Corps (JAG).⁹⁸ While women were not yet allowed on warships, female Sailors were assigned to service craft.⁹⁹ The courts helped too; in 1976, the Second Circuit Court of Appeals indicated that the Marine Corps policy of involuntarily discharging pregnant Marines violated the Due Process Clause.¹⁰⁰

Although many rates and billets in each service remained closed to female service members, the tide had changed. Women were carving out a significant place for themselves in the military across all branches and ranks. In the context of the larger women’s movement, with the support of President Carter (a Naval Academy graduate),¹⁰¹ the barriers to gender parity in the military seemed to be falling.

C. *Rostker v. Goldberg*: The Pendulum Stops

As noted above, following the national fatigue brought on by the Vietnam War, the United States discontinued the draft in 1975.¹⁰² But just five years later, President Carter felt the Soviet invasion of Afghanistan posed “a serious threat to a region that is vital to the long-term interests of the United States and our allies.”¹⁰³ It represented:

the first time since World War II that the Soviets have used their military force to invade an independent nation outside the sphere of the Warsaw Pact. This brutal act of aggression has called forth the condemnation of the whole world—and a series of firm and measured responses from the United States.¹⁰⁴

Thus, President Carter re-established the Military Selective Service System (MSSS) in the event that the United States needed to reinstate the draft itself: “Registration . . . will improve our capacity, if circumstances

96. *Id.*

97. See James L. Leuci, Navy Women in Ships: A Deployment to Equality, NAVAL HISTORY, <https://www.history.navy.mil/content/dam/museums/hrnm/Education/Women%20in%20Ships%201978%2020160207.pdf> (last visited February 12, 2017).

98. *See id.*

99. *Id.*

100. *Crawford v. Cushman*, 531 F.2d 1114, 1126 (2nd Cir. 1976).

101. See generally HENRY CARROLL, JIMMY CARTER: A BIOGRAPHY (2016).

102. See generally MITCHELL K. HALL, VIETNAM WAR ERA: PEOPLE AND PERSPECTIVES (1st ed. 2009).

103. *Selective Service Revitalization Statement*, *supra* note 1.

104. *Id.*

require, to increase the size and strength of our Armed Forces—and that capacity will itself help to maintain peace and to prevent conflict in the region of the Persian Gulf and Southwest Asia.”¹⁰⁵

Crucially, President Carter recommended that the Act be amended so that the Military Selective Service Act (MSSA) extended to include women:

My decision to register women is a recognition of the reality that both women and men are working members of our society. It confirms what is already obvious throughout our society—that women are now providing all types of skills in every profession. The military should be no exception. In fact, there are already 150,000 women serving in our Armed Forces today, in a variety of duties, up from 38,000 only 10 years ago. They are performing well, and they have improved the level of skills in every branch of the military service.

There is no distinction possible, on the basis of ability or performance, that would allow me to exclude women from an obligation to register.¹⁰⁶

President Carter’s recommendations to reinstate the MSSA and to include women in the registration were then sent to Congress, who would need to pass funding for MSSA registration.

The issue was considered extensively in hearings, committee, and debate. In fact, debate over Carter’s recommendations “dominated Congress for months, until Congress passed on June 25, 1980 . . . a statute funding registration for men only.”¹⁰⁷ Nearly every analysis of the *Rostker* decision noted below nods to these extensive debates, largely due to the Court’s reliance on such “careful consideration and debate.”¹⁰⁸ But as at least one scholar noted:

In fact, the debate about Carter’s proposal was not a break with the past, and fit smoothly within over a decade of debate over women’s military roles. In 1980, powerful governmental and popular voices[—]whether for or against Carter’s proposal[—]remained determined to limit women’s military service in ways designed to maintain and enforce women’s place in the family and civilian employment.¹⁰⁹

Nevertheless, after such debate, Congress passed and President Carter signed into law Pub. L. 96-282.¹¹⁰ The exclusion of women was immediately

105. *Id.*

106. *Id.*

107. Jill Elaine Hasday, *Fighting Women: The Military, Sex, and Extrajudicial Constitutional Change*, 93 MINN. L. REV. 96, 115 (2008).

108. *See infra* note 111.

109. Hasday, *supra* note 107 at 116.

110. Act of June 27, 1980, Pub. L. No. 96-282, 94 Stat 552.

challenged through a previously stayed case. The U.S. District Court for the Eastern District of Pennsylvania agreed with the plaintiffs that the exclusion violated the Equal Protection Clause.¹¹¹ Stayed by Justice Brennan (then Circuit Justice for the Third Circuit),¹¹² the U.S. Supreme Court took the appeal immediately.

Writing for the majority, Justice Rehnquist reversed the district court's decision.¹¹³ The Court noted the intermediate scrutiny standard, but didn't appear to apply it with the same rigor it had been using: "The Court has struck down laws that discriminate on the basis of sex unless they are 'substantially related to an important governmental interest.' While Justice Rehnquist referred to that standard in his opinion, his overriding theme was that of judicial deference to the will of Congress."¹¹⁴ That was not a controversial legal analysis; the opinion explicitly noted that "[t]he case arises in the context of Congress' authority over national defense and military affairs, and perhaps in no other area has the Court accorded Congress greater deference."¹¹⁵

To be sure, raising and supporting an army for the national defense¹¹⁶ is an important government interest; no one in the case argued otherwise. But with the increased breadth of roles women filled in the armed services by 1981, the Court's decision to give what seems like rational-basis level deference to the findings of Congress suggests that issues involving women in the military have a different standard altogether.¹¹⁷ Moreover, the decision fails to scrutinize the relationship between that interest and classification involved.

Justice Rehnquist seemed satisfied that, because women were barred from combat, registering only men was "substantially related" to the interests served in drafting service members. Yet, as noted above and outlined in the briefings for this case, less than fifteen percent of military roles were

111. *Goldberg v. Rostker*, 509 F. Supp. 586, 605 (E.D. Pa. 1980), *rev'd*, 453 U.S. 57 (1981).

112. "Ironically, though he had earlier stayed the ruling of the lower court, Justice Brennan concurred with Justices White and Marshall in dissenting from the Court's reversal of the lower court ruling." Gilbert L. Purcell and Janet Rappaport, *Rostker v. Goldberg: A Step Backward in Equal Protection, or a Justifiable Affirmation of Congressional Power?*, 9 PEPP. L. REV. 2 441, 445 n.33 (1982) (citing *Rostker v. Goldberg*, 453 U.S. 57, 86 (1981)).

113. *Rostker*, 453 U.S. at 83.

114. Linda Greenhouse, *Justices, 6-3, Rule Draft Registration May Exclude Women*, N.Y. TIMES (June 26, 1981), <http://www.nytimes.com/1981/06/26/us/justices-6-3-rule-draft-registration-may-exclude-women.html>.

115. *Rostker*, 453 U.S. at 64-65.

116. U.S. CONST. art. I, § 8, cl. 12.

117. *See Rostker*, 453 U.S. at 66 (Distinguishing from previous gender discrimination cases by noting that "Congress is permitted to legislate both with greater breadth and greater flexibility" in matters involving the military).

combatant.¹¹⁸ When the district court heard the case it “did not agree that the justifications offered by the Government for an exclusively male draft registration were substantially related to the achievement of any important governmental interests.”¹¹⁹ In his dissent, Justice Marshall noted the same issue:

[A] gender-based classification cannot withstand constitutional challenge unless the classification is substantially related to the achievement of an important governmental objective. . . . Consequently, before we can sustain the MSSA, the Government must demonstrate that the gender-based classification it employs bears ‘a close and substantial relationship to [the achievement of] important governmental objectives.’¹²⁰

Justice Marshall, joined by Justices Brennan and White, felt the government had not shown—as would be its burden under intermediate scrutiny—that drafting only men bore a close and substantial relationship to its objectives. To the contrary, Justice Marshall felt “there simply is no basis for concluding in this case that excluding women from registration is substantially related to the achievement of a concededly important governmental interest in maintaining an effective defense.”¹²¹ Marshall noted with incredulity the notion that Congress felt it needed to exclude women rather than amend the Act to authorize drafting different numbers of men and women or drafting into noncombatant roles (which it already did).¹²² He concluded that:

neither the Senate Report itself nor the testimony presented at the congressional hearings provides any support for the conclusion the Court seeks to attribute to the Report—that drafting a limited number of women, with the number and the timing of their induction and training determined by the military’s personnel requirements,¹²³

would burden military objectives in administration or training, as the Government challenged.

So why didn’t the Court adhere to the intermediate scrutiny standard it established just a few years prior and continues to apply today? The opinion tends to signal that, when it comes to national defense, women are (potential) service members first and women second. That is, because deference to the legislature seems to be at its peak on matters of national security and

118. *The Equal Rights Amendment and the Military*, *supra* note 28, at 1541 (citing 118 CONG. REC. S 4390) (daily ed. Mar. 21, 1972).

119. Purcell and Rappaport, *supra* note 112, at 445 (citing *Goldberg*, 509 F. Supp. at 605).

120. *Rostker*, 453 U.S. at 87–88 (Marshall, J., dissenting) (citations omitted).

121. *Id.* at 90.

122. *Id.* at 110–11.

123. *Id.* at 111.

defense,¹²⁴ the Court may not *really* apply traditional scrutiny standards. Justice Rehnquist's opinion seems to signal—at least for the *Rostker* majority—that was the case.¹²⁵

III. SOLDIERING ON: REVISITING *ROSTKER* AND THE ROAD FORWARD

Some thirty-five years later, *Rostker* “continues to be significant.”¹²⁶ Opponents of military gender parity cite *Rostker* not only to “validate[] the combat exclusion, [but also to] extend[] the influence of the policy and the idea.”¹²⁷ By excluding women from registration, Congress, and eventually the Supreme Court, seemed to state “that every man, regardless of any disability, must register, but that all women, regardless of competency, cannot.”¹²⁸ This reinforced “the myth that all men are more competent than all women.”¹²⁹

That sentiment remains, albeit far less prevalent.¹³⁰ Societal reticence notwithstanding, the legal justifications cited in *Rostker* no longer hold water. Although no challenges to the draft on the basis of gender discrimination have reached the Supreme Court since *Rostker*, all evidence seems to suggest the current Supreme Court would reverse course. And the Court may have such an opportunity: two lawsuits have already started to make their way through the courts. In February 2016, the Ninth Circuit ruled in favor of the National Coalition for Men, who challenged the exclusion of women from the draft on the grounds that it is a violation of Equal Protection.¹³¹ The

124. See, e.g., *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (recognizing the power of the U.S. Government to detain U.S. citizens deemed enemy combatants).

125. *Rostker*, 453 U.S. at 66. (“[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.”). But see *id.* at 89 (Marshall, J., dissenting) (“[T]he phrase ‘war power’ cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit. ‘[E]ven the war power does not remove constitutional limitations safeguarding essential liberties.’”).

126. MEGAN MACKENZIE, *BEYOND THE BAND OF BROTHERS: THE US MILITARY AND THE MYTH THAT WOMEN CAN’T FIGHT* 37 (2015).

127. *Id.* at 40.

128. Linda Greenhouse, *Women Join Battle on All-Male Draft*, N.Y. TIMES (Mar. 22, 1981), <http://www.nytimes.com/1981/03/22/us/women-join-battle-on-all-male-draft.html>.

129. *Id.*

130. See, e.g., Nicholas Clairmont, *The Unseemly Death of an Amendment to Draft Women*, ATLANTIC (May 20, 2016), <https://www.theatlantic.com/politics/archive/2016/05/the-unlikely-birth-and-unseemly-death-of-an-amendment-to-draft-americas-women/483599/>; D.C. McAllister, *Threats of Drafting Women Reveal the Lies of Equality*, FEDERALIST (Feb. 8, 2016), <http://thefederalist.com/2016/02/08/threats-of-drafting-women-reveal-the-lies-of-equality/>.

131. Kaitlin Sandin, *Women and the Draft: Is the House Delaying the Inevitable?*, GEO. SECURITY STUD. REV. (Sept. 25, 2016), <http://georgetownsecuritystudiesreview.org/2016>

case is currently being reconsidered by the district court. Additionally pending is *Kyle v. Selective Service*, a case brought by a 17-year-old girl suing for the right to legally register for the Selective Service.¹³²

A gender-neutral draft is the logical next step considering the evolving roles of women in the military. Notably:

The first woman to command a U.S. Navy warship did so in 1990. In 1991, women were cleared to fly fighter jets in combat; two years later, Congress authorized women to serve on combat ships at sea. 1998 marked the first female fighter pilots to fly combat missions off of an aircraft carrier. The first women to command a U.S. Navy warship and U.S. Air Force fighter squadron were given their commands in 1998 and 2004, respectively. By 2010, women were cleared to serve aboard submarines. According to the Army, by September 2015 ‘437 women earned awards for valor to include two Silver Stars, three Distinguished Flying Crosses, 31 Air Medals, and 16 Bronze Stars.’ As Secretary Carter noted, between the 2013 memorandum and the 2015 policy change, we also saw ‘women soldiers graduate from the Army’s Ranger School.’¹³³

Since the combat exclusion has been lifted, the argument that the United States only drafted men for combat positions lacks even a tangential relationship to the stated goals of selective service registration. That said, the GOP’s 2016 official platform sought “to exempt women from ‘direct ground combat units and infantry battalions.’”¹³⁴ While this platform seems to be in contention with military leadership,¹³⁵ and even in contention with some prominent Republicans,¹³⁶ it is worth considering the fate of women and the draft in the event that the ban on women in combat is reinstated.

/09/25/women-and-the-draft-is-the-house-delaying-the-inevitable/ (citing Nat’l Coal. for Men v. Selective Serv. Sys., 640 F. App’x 664 (9th Cir. 2016)).

132. *Id.*

133. Russell Spival and Adam Aliano, *Should Women Register for Selective Service? The Legacy of Rostker v. Goldberg*, LAWFARE (Dec. 23, 2016), <https://www.lawfareblog.com/should-women-register-selective-service-legacy-roster-v-goldberg> (citations omitted).

134. Jeff Daniels, *Trump Could Nix Obama’s Women in Combat Military Policy*, CNBC (Nov. 14, 2016, 5:08 PM), <http://www.cnbc.com/2016/11/14/trump-could-nix-obamas-women-in-combat-military-policy.html>.

135. For an overview of the studies conducted and policy decisions made prior to lifting the combat exclusion, see Department of Defense Press Briefing by Secretary Carter in the Pentagon Briefing Room (December 3, 2015), <https://www.defense.gov/News/Transcripts/Transcript-View/Article/632578/departments-of-defense-press-briefing-by-secretary-carter-in-the-pentagon-briefing>.

136. See Sandin, *Women and the Draft*, *supra* note 131 (noting that Sen. John McCain (R-AZ) and Majority Leader Mitch McConnell (R-KY) support mandating gender-neutral registration). Although that support was offered prior to the November 2016 election, neither Senator McCain nor McConnell have issued any contrary statements.

Should that occur, the result should still be the same: the justifications for excluding women from the draft no longer remain. “[W]omen serve—and die—in combat, as the [] war in Iraq has amply demonstrated.”¹³⁷ Even before the Obama Administration pushed to lift the combat ban, women were “barred from an unprecedentedly small and steadily decreasing number of military positions, and only by military regulation rather than statute. Public opinion surveys find markedly increased support for women’s military service, including in combat.”¹³⁸

Immediately following *Rostker*, “several lawyers for feminist organizations that participated in the case said they thought the majority’s rationale signaled a retreat from the special ‘scrutiny’ that the Court has applied to sex discrimination issues in the last five years.”¹³⁹ But in a symmetry not often found in the legal world, those lawyers would be proven decidedly wrong fifteen years later when the architect of intermediate scrutiny, now Justice Ruth Bader Ginsburg, wrote for the majority in *United States v. Virginia*.¹⁴⁰ If *Rostker* represented the low water mark for intermediate scrutiny, *United States v. Virginia* seems to represent the inverse.¹⁴¹ Writing for the majority, Justice Ginsburg applied “skeptical scrutiny,”¹⁴² seemingly the version of intermediate scrutiny Justice Marshall envisioned in his *Rostker* dissent.

At the time the case was heard, the Virginia Military Institute (VMI) only admitted men.¹⁴³ This state-run facility (thus left unchanged after the federal service academies integrated women) was gender segregated. The state wished to avoid an Equal Protection challenge by opening a separate facility for females, the Virginia Women’s Institute for Leadership (VWIL).¹⁴⁴ The state produced evidence surrounding the “adversative method” employed at VMI, which it believed could only accommodate male students.¹⁴⁵ Justice Ginsburg’s decision demanded more justification and afforded less deference to VMI. Channeling years of litigation spent in pursuit of heightened scrutiny for gender discrimination, Ginsburg wrote:

137. Hasday, *supra* note 107, at 97 (citations omitted).

138. *Id.*

139. Greenhouse, *Justices*, *supra* note 114.

140. 518 U.S. 515 (1996).

141. See Anita K. Blair, *U.S. v. Virginia: The New and Improved Equal Protection Clause*, CIV. RTS. PRAC. GROUP (The Federalist Soc’y for Law & Pub. Policy Studies) (May 1, 1997), <http://www.fed-soc.org/publications/detail/us-v-virginia-the-new-and-improved-equal-protection-clause>.

142. *Virginia*, 518 U.S. at 531.

143. *Id.* at 520.

144. *Id.* at 526–27. It is worth noting that Chief Justice Rehnquist, author of the *Rostker* opinion, concurred in this case. He declined to join the majority’s reasoning, because he felt the VWIL could have avoided violating the Equal Protection Clause with adequate funding.

145. *Id.* at 527–28.

'Inherent differences' between men and women, we have come to appreciate, remain cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual's opportunity. Sex classifications may be used to compensate women 'for particular economic disabilities [they have] suffered,' to 'promot[e] equal employment opportunity,' to advance full development of the talent and capacities of our Nation's people. But such classifications may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women.¹⁴⁶

Within that context, the Court found that "Virginia ha[d] shown no 'exceedingly persuasive justification' for excluding all women from the citizen-soldier training afforded by VMI."¹⁴⁷

Twenty years later, the arguments for excluding women from selective service registration fail within the context of today's female service members and fail under this standard. "The transformation in women's military status has undermined *Rostker's* foundation, making restrictions on women's military service that *Rostker* did not explain because they seemed so commonsensical now demand explanation and appear constitutionally vulnerable."¹⁴⁸ There is no longer a viable, let alone exceedingly persuasive, justification for this exclusion.

IV. CONCLUSION

Even in the current geopolitical climate, there is nothing to suggest the United States will draft any citizen into military service ever again. Yet Congress still debates (or taunts)¹⁴⁹ the registration of women for selective service and males must register within thirty days of their eighteenth birthday. This classification is based on sex and, just as the statutes Ruth Bader Ginsburg challenged, seems to favor women: those women who want to serve still can but those that do not wish to do so do not risk being drafted. But if there ever was an exceedingly persuasive justification for the exclusion, it flew out the window of a female-piloted F-14 decades ago. And what's more, the exclusion does not favor women, particularly those within the service: by excluding women from registration, Congress reinforces the harmful stereotype "that every man, regardless of any disability, must register, but that all women, regardless of competency, cannot."¹⁵⁰ This myth—that all men are more competent than all women—may not be used, as [it] once [was], to create or perpetuate the legal, social, and economic inferiority

146. *Id.* at 533–34 (citations omitted).

147. *Id.* at 534.

148. *See* Hasday, *supra* note 107, at 103.

149. *See* Clairmont, *supra* note 130.

150. Greenhouse, *supra* note 128.

of women.¹⁵¹ Whether Congress amends the law or the Court strikes down the gender discriminatory draft, a change is required and overdue.

151. *Virginia*, 518 U.S. at 534 (citations omitted).